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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JORGE ESTRADA MARTINEZ et al., Defendants and Appellants.	B209063 (Los Angeles County Super. Ct. No. BA240842)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed as modified.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Estrada Martinez.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Flores Sandoval.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Estrada Martinez and Jorge Flores Sandoval appeal from the judgments entered after separate juries convicted them each of one count of first degree felony murder and two counts of second degree robbery, with true findings on related firearm enhancements.[1] Martinez and Sandoval contend the trial court erred in denying their requests for jury instructions on self defense and contend they were entitled to instructions on certain lesser included offenses. They also request adjustment of their presentence custody credits and vacation of an improper fine. We agree with the last two points and modify the judgments accordingly. In all other respects we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Crimes*

On December 17, 2002 Martinez and Sandoval were driven by Alejandro Viveros to a hardware store at the corner of 45th and Main Streets in south Los Angeles. They testified at trial they intended to purchase screws to repair the spoiler on Viveros's car and to collect $6,000 Martinez claimed the store owner, Claro Cortes, owed him for a drug transaction. Martinez and Sandoval were each armed with a 9 millimeter, semi-automatic handgun for protection because they knew Cortes carried a gun. Sandoval walked into the store, saw Cortes speaking with a customer in one of the aisles and walked toward him. Martinez followed him into the store and approached Cortes's wife, Elvia, who stood at the cash register. According to Martinez, he tried to tell Elvia he had come for the money Cortes owed him. Elvia, however, testified Martinez, who had a gun in his hand, told her "it was a robbery and that I should open the cash register." Before she could open the register, shots were fired; and Martinez ran toward the back of the store. He testified he saw Cortes shooting at Sandoval (who had his gun drawn) and fired at Cortes to protect his friend. Martinez emptied his entire clip before he and Sandoval

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[1] This is the second appeal by Martinez and Sandoval arising from these crimes. We reversed the convictions returned by the jury at their first trial because the court required Martinez and Sandoval and a third codefendant to share one interpreter without a valid waiver of their right to individual interpreters. (See *People v. Martinez* (Jan. 30, 2007, B174379) [nonpub. opn.].)

ran from the store to Viveros's car. Cortes, who had been shot four times with bullets from Martinez's gun, collapsed and later died of his wounds.[2] Police officers who were nearby stopped the car a short distance from the store and arrested all three occupants. Sandoval had been shot twice in the leg and was taken to a nearby hospital.

2. *The Legal Proceedings*

The amended information charged Martinez and Sandoval with the first degree murder of Cortes (Pen. Code, § 187, subd. (a))[3] while engaged in the commission of an attempted robbery (§ 190.2, subd. (a)(17)). In counts 3 and 4 both men were charged with the attempted robbery (§§ 211 & 664) of Claro and Elvia Cortes. The information also alleged a principal was armed with a firearm during commission of the offenses (§ 12022, subd. (a)(1)), and each man had personally used and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c) & (d)).

The People tried the case on a felony murder theory, seeking to prove Martinez and Sandoval entered the store with the intent to rob the store. In support of this theory a police officer who interviewed Sandoval after he had been treated for his wounds testified Sandoval had admitted he and Martinez entered the store to rob it.[4]

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[2] The customer, Vincent Fredricks, was also fatally shot in the incident. Martinez and Sandoval were originally charged with his murder but were acquitted of the charge during their first trial when the evidence indicated Fredricks had been killed by a bullet from Cortes's gun. (But see *People v. Briscoe* (2001) 92 Cal.App.4th 568, 581 ["[W]hen the perpetrator of a crime—with a conscious disregard for life—intentionally commits an act that is likely to result in death and the crime victim kills in reasonable response to that act, the perpetrator is guilty of murder. In this situation, the killing is attributable—not merely to the commission of a felony—but to the intentional act of the perpetrator committed with conscious disregard for life. The victim's killing in self-defense is not deemed to be an independent intervening cause relieving the perpetrator of liability because the killing is a reasonable response to the dilemma thrust on the victim by the perpetrator's intentional act."].)

[3] Statutory citations are to the Penal Code unless otherwise indicated.

[4] An audiotape of this interview was played for Sandoval's jury but not for Martinez's jury.

Martinez and Sandoval each testified in his own defense. Martinez claimed he had sold substantial quantities of crystal methamphetamine to Cortes and Cortes owed him an additional $6,000 that Martinez intended to collect when he directed Viveros to Cortes's store. He was attempting to explain the debt to Elvia Cortes, whom he did not know, when her husband began firing at Sandoval. Martinez shot at Cortes when he saw Cortes shooting at Sandoval. Sandoval echoed Martinez's version of events and claimed the police officers had forced him to admit he and Martinez were trying to rob the store.

In rebuttal the People called a police officer who testified he had interviewed Martinez on the evening of the crime and Martinez had admitted he and Sandoval had intended to rob the store, which had been picked at random. In a tape played for the jury that had been recorded without Martinez's knowledge, Martinez admitted he and Sandoval had intended to rob the store.

At the conclusion of evidence, the court rejected Martinez's and Sandoval's requests to instruct the jury on self defense, stating "There is a longstanding series of jurisprudence in California iterating and reiterating the law that self defense is irrelevant in a felony murder prosecution."

Martinez and Sandoval were each convicted of the first degree murder of Cortes and two counts of attempted robbery. The juries found true the following special allegations: (1) the murder was committed while Martinez and Sandoval were engaged in the commission of an attempted robbery; (2) a principal was armed with a firearm during commission of the offenses; (3) Martinez and Sandoval personally used and personally and intentionally discharged a firearm; and (4) Martinez personally and intentionally discharged a firearm that proximately caused Cortes's death. The trial court sentenced both men to life without the possibility of parole on the first degree felony murder count. Martinez was sentenced to an additional consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). Sandoval was sentenced to an additional consecutive term of 20 years to life under section 12022.53, subdivision (c). The court imposed but stayed pursuant to section 654 a term of two years (the middle term) for each of the attempted robbery counts. The firearm

enhancements related to these counts were also imposed and stayed. Both men were ordered to pay a $10,000 restitution fine pursuant to section 1202.4, a $60 court security fee pursuant to section 1465.8, subdivision (a)(1), a state court construction fine of $5,030 pursuant to Government Code section 70372, subdivision (a), and restitution to the state victim compensation fund in the amount of $7,500. They were each awarded 2,001 days of presentence credit, which was erroneously recorded as 20,001 days in the clerk's transcript and abstracts of judgment.

DISCUSSION

1. *The Duty To Instruct According to the Evidence Presented*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.""""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser-included offense are present. (*Ibid.*; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Likewise, a trial court must instruct on an asserted defense, including self-defense, if there is sufficient evidence from which a reasonable juror could find the defense applicable. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1046; *Breverman*, at p. 154.) When a trial court refuses a proposed instruction for lack of evidence, we review the record de novo to determine whether the record contains substantial evidence to warrant the instruction.[5] (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584; *People v. Cruz* (2008) 44 Cal.4th 636, 664.)

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[5] In this context, "substantial evidence" means """evidence from which a jury composed of reasonable [persons] could . . . conclude[]""" that the particular facts underlying the instruction did exist. (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Wilson* (2008) 43 Cal.4th 1, 16 ["[t]here was no substantial evidence, that is, evidence that a reasonable jury would find persuasive," to warrant lesser-included offense instruction].)

This, of course, presumes the instruction is legally justified: "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

2. *The Statutory Scheme for Homicide*

California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice. (See § 187.) Malice exists, if at all, only when an unlawful homicide was committed with the intention unlawfully to take away the life of a person (§ 188), or with awareness of the danger and a conscious disregard for life (*People v. Knoller* (2007) 41 Cal.4th 139, 166-167; see also *People v. Watson* (1981) 30 Cal.3d 290, 300 [wanton disregard for human life]). In certain circumstances, however, a finding of malice may be precluded, and the offense limited to manslaughter, even when an unlawful homicide was committed with an intent to kill. In such a case, the homicide, though not murder, can be no less than voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

Murder can be either first or second degree. First degree murder requires proof the killing was "willful, deliberate, and premeditated" or accompanied by one of several enumerated circumstances, one of which is "the perpetration of, or attempt to perpetrate, . . . robbery." (§ 189.) Second degree murder "is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation that would support a conviction of first degree murder." (*People v. Knoller*, *supra*, 41 Cal.4th at p. 151.)

Under the felony murder rule set forth in section 189, a homicide is first degree murder, and not second degree murder or manslaughter, when it occurs in the course of certain serious and inherently dangerous felonies such as robbery or burglary. Under this rule, malice is legally implied from the intent to commit an inherently dangerous felony that actually results in death, thus establishing the extent of culpability appropriate to murder.

3. *Self-defense and Imperfect Self-defense*

Homicide is justified when committed in self-defense, that is, when the defendant actually and reasonably believes in the need to defend against imminent bodily injury or death. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1081; *People v. Breverman, supra,* 19 Cal.4th at p. 154; see also § 197 [homicide justified when killing is accomplished in defense of self or others]; § 198 [circumstances excusing homicide must be "sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone"].) A jury must consider what "'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.'" (*Humphrey,* at p. 1083.)

By contrast, *imperfect* or unreasonable self-defense is not a true defense, but is instead "a shorthand description of one form of voluntary manslaughter" (*People v. Barton* (1995) 12 Cal.4th 186, 200), comprising an unlawful killing in which the defendant, while harboring either an intent to kill or a conscious disregard for life, kills in an actual but unreasonable belief in the need to act in self-defense. (§ 192, subd. (a); *People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Blakeley* (2000) 23 Cal.4th 82, 87-89, 91; see *In re Christian S.* (1994) 7 Cal.4th 768, 771.) Accordingly, "when a defendant is charged with murder the trial court's duty to instruct sua sponte . . . on unreasonable [i.e., imperfect] self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Barton,* at p. 201.)

4. *The Trial Court Did Not Err in Failing To Instruct on Lesser Included Offenses or Self-defense*

Martinez and Sandoval argue the amended information alleged straight first degree murder—that is, murder with malice, not felony murder—and, accordingly, the trial court was required to instruct on the lesser included offenses of that crime.[6] Citing *People v.*

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[6] A particular offense is considered a "lesser included offense," and therefore subject to the duty to instruct, if it satisfies one of two tests. The "elements" test is

Anderson (2006) 141 Cal.App.4th 430 (*Anderson*), they contend, even if the prosecution justifiably proceeded on a felony murder theory, they were entitled to have the juries instructed on second degree murder, the elements of which are encompassed by the charges set forth in the accusatory pleading.

Anderson is distinguishable. In *Anderson* the defendant successfully challenged her felony murder conviction on the ground the trial court had not instructed the jury on second degree murder or voluntary manslaughter, lesser included offenses of first degree murder in violation of section 187, which was the only crime charged in the information. (*Anderson, supra*, 141 Cal.App.4th at pp. 444-445.) The *Anderson* court's reversal was premised in part on the complete absence in the accusatory pleading of any allegation of a predicate felony for a felony murder conviction. (*Id.* at p. 445.) Here, as in *Anderson,* the amended information charged the "crime of murder, in violation of Penal Code Section 187. . . with malice aforethought." Nonetheless, the information in this case additionally alleged the killing was committed while Martinez and Sandoval were "engaged in the attempted commission of . . . the crime of robbery and burglary, within the meaning of Penal Code Section 190.2 (a)(17)." This further allegation clearly constitutes a charge of felony murder and put Martinez and Sandoval on notice the prosecution would proceed under this theory.[7]

Notwithstanding this difference between *Anderson* and the case at bar, Martinez and Sandoval contend their juries were entitled to be instructed in accordance with their

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satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser; the "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Cook* (2001) 91 Cal.App.4th 910, 918; accord, *People v. Anderson* (2006) 141 Cal.App.4th 430, 442-443.)

[7] Certainly, Martinez and Sandoval cannot claim they were surprised by the prosecution's reliance on a felony murder theory because the first trial in this matter also proceeded to the jury on a felony murder theory. (See *People v. Martinez*, *supra*, (B174379).)

theory of the case, which, at a minimum, was supported by their own testimony. As they argue, when the evidence does not "indisputably" indicate a felony murder, the court must instruct on any lesser offense supported by the evidence. (*Anderson*, *supra*, 141 Cal.App.4th at p. 448.)

But, as discussed above, because the People proceeded solely on a felony-murder theory, they were not required to prove malice, either express or implied in fact. (See *People v. Dillon* (1983) 34 Cal.3d 441, 475 ["[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime"].) Under their theory of the case, the People needed to establish only that Cortes was killed during the course of a robbery—accidentally or otherwise: "Under these circumstances, a trial court 'is justified in withdrawing' the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of first degree murder." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909.)

Likewise, as the trial court recognized, a number of courts have concluded it is not necessary to instruct a jury on self-defense or imperfect self-defense when the prosecution proceeds solely on a felony-murder theory. (See, e.g., *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170; *People v. Tabios* (1998) 67 Cal.App.4th 1, 6-9.) "The purpose of the felony-murder rule is to deter even accidental killings in the commission of designated felonies by holding the felon strictly liable for murder." (*Loustaunau*, at p. 170.) The perpetrator "cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule." (*Ibid.*)

In other words, the only relevant factual inquiry for the juries was whether Martinez and Sandoval entered the store with the intention of robbing it. Any killing that resulted from that conduct was first degree murder, whether or not the shots were fired in perceived self-defense. Here, each jury was instructed that, to find the robbery-murder special circumstance to be true, it must be proved that "[t]he murder was committed while a defendant was engaged in or was an accomplice in the attempted commission of a robbery." (CALJIC No. 8.81.17.) Martinez and Sandoval were free to argue, and did in fact argue, they entered the store not to rob it but to collect the money Cortes owed them.

Nonetheless, the juries found the special circumstance true as to both Martinez and Sandoval. In so doing, the jurors necessarily rejected the argument the killing was committed in self-defense.

5. *The Abstracts of Judgment Must Be Modified*

Martinez and Sandoval challenge the court's imposition of a court construction fine pursuant to Government Code section 70372, subdivision (a), and the court's calculation of presentence custody credits. The People concede, and we agree, the fine was erroneously imposed. The People also acknowledge Martinez and Sandoval are each entitled to 2,011 days of presentence custody credits.

DISPOSITION

The judgments are each modified to strike the $5,030 fines imposed under Government Code section 70372, subdivision (a), and to restate the presentence custody credits in the amount of 2,011 days. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.